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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Nos. 498, 499, 500

ROBERT BARTLETT, Both Individually and as Trustee,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA, THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, *et al.*

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, as amended, Appellant submits this statement disclosing the basis of the jurisdiction of the Supreme Court of the United States to review the judgment for decree of the Supreme Court of Indiana entered in this cause.

Except in quoted matter, Robert Bartlett, both Individually and as Trustee, will be referred to as Appellant and the Gross Income Tax Division, *et al.* will be referred to as Appellees.

Nature of the Case

On January 23, 1942 Appellant commenced this action in the Marion Circuit Court, Indianapolis, Indiana, against Appellees or their predecessors, to recover taxes alleged to have been unconstitutionally exacted for the year 1937 under the Indiana Gross Income Tax Act of 1933, as amended. Issue was joined and this cause, together with two other similar actions commenced by Appellant involving the years 1935 and 1936, came on for trial and were consolidated for hearing.*

The three cases were submitted on stipulations of fact, exhibits and certain explanatory statements of counsel, on the basis of which the Marion Circuit Court on April 12, 1949 made the following Findings of Fact and Conclusions of Law (R. 63-79):

> "These three causes, Nos. 56639, 57489 and 58159, having been consolidated for trial, came on to be heard upon the complaints of the plaintiff, Robert Bartlett, both individually and as Trustee for the Robert Bartlett Realty Co. (Not Incorporated); the answers thereto of the defendants, or their predecessors in office; the statements of counsel made upon the hearing of this cause; the exhibits of the plaintiff numbered 1 to 12, both inclusive, being: No. 1, Joint Exhibit "A", Stipulation of Facts; No. 2, Joint Exhibit "B", Stipulation of Facts; No. 3, Additional Stipulation of Fact of September 12, 1947; No. 4, Claim for Refund for 1935; No. 5, Letter dated November 27, 1939, from Gross Income Tax Division, Department of Treasury, addressed to Robert Bartlett Realty Company, 111 West Washington Street, Chicago, Illinois, being ruling of E. F. Marchino, Hearing Judge; No. 6, Letter dated November 27,

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* (Cler's Note.—See stipulation as to printing statements as to jurisdiction following Appendix "A".)

1939, from Gross Income Tax Division Department of Treasury, addressed to Robert Bartlett Realty Company, 111 West Washington Street, Chicago, Illinois, stating that Claim for Refund for 1935 was denied on the grounds set forth in Plaintiff's Exhibit No. 5; No. 7, Claim for Refund for 1936; No. 8, Claim for Refund for 1937; No. 9, Form of written agreement used with respect to sale of lots in Beverly Shores; No. 10, Form of written agreement used with respect to sale of lots in Lake Shore; No. 11, Form of deed used in conveying lots in Beverly Shores; and No. 12, Form of deed used in conveying lots in Lake Shore—all of which exhibits have been admitted in evidence and constitute a part of the record in each of said causes Nos. 56639, 57489 and 58159. And all objections made by the defendants to said exhibits having been overruled, and the Court having considered said pleadings, said statements of counsel made upon the hearing of these causes, said exhibits and stipulations of fact and oral arguments and written briefs made and filed herein on behalf of the plaintiff and the defendants, and having been duly requested to find the facts specially, and now being fully advised in the premises, DOTH FIND:

Findings of Fact:

"1. These three proceedings, Nos. 56639, 57489 and 58159, were brought by the plaintiff against the appropriate defendants to recover taxes alleged to have been wrongfully exacted under the Indiana Gross Income Tax Act of 1933, as amended, for the years 1935, 1936 and 1937 and were consolidated for the purposes of trial. Cause No. 56639 relates to the year 1935 and involves $2,392.37 in taxes; Cause No. 57489 relates to 1936 and involves $3,128.31 in taxes; and Cause No. 58159 relates to 1937 and involves $3,629.34 in taxes.

"2. In these proceedings the plaintiff, both individually and as Trustees for the Robert Bartlett Realty Co. (Not Incorporated), should be regarded as a non-

resident individual. He is a natural born citizen of the United States and is now, and for many years last past has been, a citizen of the State of Illinois, and a *bona fide* resident of, and domiciled in, the City of Chicago, County of Cook, State of Illinois.

"3. The principal office and place of business of the plaintiff has always been located at 111 West Washington Street, Chicago, Illinois.

"4. On or about April 27, 1933, the plaintiff acquired the subdivision known as Beverly Shores which comprised about 1100 acres of land bordering on the Southeastern shore of Lake Michigan, in Porter County, Indiana. On or about June 15, 1933, the plaintiff also acquired the subdivision known as Lake Shore which comprised about 1800 acres of land bordering on the Southeastern shore of Lake Michigan and located partly in Porter County and partly in LaPorte County, Indiana.

"5. The former owner of Beverly Shores and Lake Shore from whom the plaintiff acquired these subdivisions was a citizen of the United States and of the State of Illinois, and a *bona fide* resident of, and domiciled in, the State of Illinois, living in Chicago, Illinois. All negotiations leading up to the acquisition of Beverly Shores and Lake Shore by the plaintiff, as well as all the contracts, agreements, conveyances and other instruments of transfer or assignment incident thereto, were carried on, made, executed and delivered in Chicago, Illinois. The purchase price for Beverly Shores and Lake Shore was paid by the plaintiff and received by the former owner thereof in Chicago, Illinois.

"6. Prior to the acquisition of Beverly Shores and Lake Shore by the plaintiff, the land comprising them had been subdivided and placed on the market for sale by their former owner, that is to say: The land had been laid out into various blocks, lots, streets, avenues and alleys. The streets and avenues had been improved. Gas mains had been laid. Some of the lots had been sold and conveyed to various purchasers, and other of the lots were subject to outstanding real

estate sales agreements at the time these subdivisions were acquired by the plaintiff.

"7. The land comprising Beverly Shores and Lake Shore is primarily suitable for subdivisions designed for modest homes or cottages used mainly for vacation or resort purposes. Beverly Shores and Lake Shore are approximately thirty-five miles from Chicago, Illinois. Good and modern transportation facilities were available during the period in question between Chicago and its surrounding suburbs and Beverly Shores and Lake Shore. These facilities including modern, wide, hard surface highways and an electrified railway which provided fast, efficient and regular service.

"8. After the plaintiff acquired Beverly Shores and Lake Shore, he began to procure purchasers for the unsold lots in these subdivisions. These transactions were all made in the usual course of business by the plaintiff and, with the exception of a very few cash deals, were made on the installment basis and were evidenced by written agreements, forms of which are in evidence as Plaintiff's Exhibits 9 and 10.

"9. The usual procedure followed by the taxpayer in obtaining these written agreements was, briefly, as follows: not less than 98% of the persons who entered into these written agreements relating to the acquisition of lots in Beverly Shores and Lake Shore were non-residents of Indiana, living in or near Chicago, Illinois. There was and is practically no market for said lots in Indiana, the only available market for such lots being in the metropolitan district of Chicago Illinois. These Illinois residents were contacted and interviewed by the plaintiff in or near Chicago, Illinois, through his Chicago organization. Upon such Illinois residents showing an interest in acquiring a lot or lots in Beverly Shores or Lake Shore arrangements were usually made for a view of the property by them. Thereafter, if the prospective Illinois customer decided to enter into a written agreement with the plaintiff, such written agreement, in the form in evidence as Plaintiff's Exhibits 9 or 10, was executed

in duplicate by the plaintiff at his office in Chicago, Illinois. One copy was delivered to the Illinois customer in Chicago, Illinois, and the other copy was retained by the plaintiff and remained at his office in Chicago, Illinois. The payments provided for in the agreement were made payable and received at the office of the plaintiff in Chicago, Illinois. As the agreements were paid up, deeds in the form in evidence as Plaintiff's Exhibits 11 and 12 were executed in Chicago, Illinois, and delivered in Chicago, Illinois, by the plaintiff to the persons entitled thereto, and the grantees attended to the recording of the deeds in the appropriate County in Indiana if such grantees desired to record their deeds.

"10. All records and books of account of the plaintiff were kept at his office in Chicago, Illinois, and all entries relating to his business were made there by him or his employees who were non-residents of the State of Indiana. The entire office force of the plaintiff, including the sales force (with possibly one or two exceptions) were non-residents of the State of Indiana and worked at or from the office of the plaintiff in Chicago, Illinois. Their salaries or other compensation were paid there. The plat price of the various lots in Beverly Shores and Lake Shore was determined by the plaintiff in Chicago, Illinois, and there is where all bills for supplies, materials, advertising and general overhead were paid. All the bank accounts of the plaintiff were with Chicago banks. The plaintiff had no bank account in Indiana, and kept none of his books or records in Indiana.

"11. In order for the plaintiff successfully to obtain the written agreements relating to the sale of lots in Beverly Shores and Lake Shore, and to make collections of the payments therein specified, he had to, and did open and maintain an office and a large organization in Chicago, Illinois, this being the location of the only available market for said lots. His organization consisted of salesmen, managers, bookkeepers, collectors and other employees. With very few exceptions,

all employees, other than the salesmen, devoted all their time and efforts outside the State of Indiana. The salesmen devoted at least 85% of their time and efforts outside of the State of Indiana and in or near Chicago, Illinois. The plaintiff, also in order successfully to obtain the written agreements relating to the sale of lots in Beverly Shores and Lake Shore, and to make collections of the payments therein specified, had to, and did, expend large sums from time to time in Chicago, Illinois, for advertising in Illinois, for traveling expenses in Illinois, for office supplies and repairs in connection with his Chicago office, for commissions on collections made in Illinois, for telephone and telegraph expense in Illinois, for rent for his Chicago office, and for other miscellaneous items.

"12. In order for the plaintiff successfully to obtain the written agreements relating to the sale of lots in Beverly Shores and Lake Shore, and to make collections of the payments therein specified, he had to, and did, incur and expend in the State of Illinois approximately the following sums for the following items.

	During the last half of 1933
(a) Salaries for employees who devoted all their time in Illinois	$ 12,088.60
(b) Compensation to salesmen who devoted at least 85% of their time in Illinois	46,825.01
(c) Advertising in Illinois	2,553.63
(d) Transportation in Illinois	6,289.62
(e) Office rent, supplies and repairs in connection with plaintiff's office in Chicago, Illinois	9,477.13
(f) Commissions on collections in Illinois	6,813.95
(g) Telephone and telegraph expense in Illinois	1,321.15
(h) Miscellaneous items in Illinois	5,659.90
Total	$ 91,028.99

During the year 1934

(a) Salaries for employees who devoted all their time in Illinois	$ 60,925.67
(b) Compensation to salesmen who devoted at least 85% of their time in Illinois	100,595.40
(c) Advertising in Illinois	9,350.03
(d) Transportation in Illinois	10,359.35
(e) Office rent, supplies and repairs in connection with plaintiff's office in Chicago, Illinois	14,013.20
(f) Commissions on collections in Illinois	14,803.17
(g) Telephone and telegraph expense in Illinois	3,041.21
(h) Miscellaneous items in Illinois	5,496.04
Total	$218,584.07

During the year 1935

(a) Salaries for employees who devoted all their time in Illinois	$ 63,677.35
(b) Compensation to salesmen who devoted at least 85% of their time in Illinois	134,913.32
(c) Advertising in Illinois	20,947.05
(d) Transportation in Illinois	16,937.30
(e) Office rent, supplies and repairs in connection with plaintiff's office in Chicago, Illinois	15,958.90
(f) Commissions on collections in Illinois	13,398.58
(g) Telephone and telegraph expense in Illinois	4,298.66
(h) Miscellaneous items in Illinois	7,043.36
Total	$277,174.52

During the year 1936

(a) Salaries for employees who devoted all their time in Illinois	$ 71,036.76
(b) Compensation to salesmen who devoted at least 85% of their time in Illinois	137,219.73
(c) Advertising in Illinois	10,692.94
(d) Transportation in Illinois	16,644.88
(e) Office rent, supplies and repairs in connection with plaintiff's office in Chicago, Illinois	24,196.45
(f) Insurance	6,755.37
(g) Telephone and Telegraph expense in Illinois	4,506.58
(h) Miscellaneous items in Illinois	16,886.89
Total	$287,939.60

During the year 1937

(a) Salaries for employees who devoted all their time in Illinois	$ 75,471.55
(b) Compensation to salesmen who devoted at least 85% of their time in Illinois	144,204.30
(c) Advertising in Illinois	17,834.19
(d) Transportation in Illinois	17,235.33
(e) Office rent, supplies and repairs in connection with plaintiff's office in Chicago, Illinois	23,574.95
(f) Insurance	8,744.69
(g) Telephone and telegraph expense in Illinois	5,832.01
(h) Miscellaneous items in Illinois	19,961.93
Total	$312,858.95

"13. The aggregate of the expense items for the years 1933 to 1937, both inclusive, referred to in the foregoing paragraph 12 of these Findings of Fact,

amounted to not less than 50% of the aggregate payments specified in the written agreements relating to the sale of lots in Beverly Shores and Lake Shore obtained by the plaintiff in 1933, 1934, 1935, 1936 and 1937. In other words, the costs and expenses to the plaintiff (exclusive of the cost of the lots) in obtaining the written agreements relating to the sale of lots in Beverly Shores and Lake Shore and in collecting the payments therein specified, aggregated not less than 50% of such payments.

"14. As a necessary and integral part of the business of obtaining the written agreements relating to the sale of lots in Beverly Shores and Lake Shore the plaintiff furnished transportation for prospective Illinois customers from Chicago, Illinois, to these subdivisions in Indiana and return transportation to Chicago, Illinois. In other words, persons living in or near Chicago, Illinois, who showed an interest in Beverly Shores or Lake Shore would be provided transporation by the plaintiff from Chicago, Illinois, to these subdivisions where such persons would view these subdivisions and the particular lots in which they were interested. Thereafter, these Illinois residents would be provided transportation back to Chicago, Illinois, by the plaintiff. The plaintiff expended the following sums for such transportation: During the last half of 1933, the sum of $8,489.62; during 1934, the sum of $13,661.51; during 1935, the sum of $22,370.80; during 1936, the sum of $21,646.71; and during 1937, the sum of $21,216.30.

"15. If the plaintiff had not established and maintained his aforesaid office and large organization in Chicago, Illinois, or had not performed the activities and services outside the State of Indiana hereinabove set forth, or had not made the expenditures for the items referred to in paragraph 12 of these Findings of Fact, or had not furnished the transportation referred to in paragraph 14 of these Findings of Fact, he would not have been able to obtain any written

agreements relating to the sale of lots in Beverly Shores or Lake Shore during 1933, 1934, 1935, 1936 or 1937, excepting for payments which would have equalled only a small percentage of the payments actually specified in written agreements obtained by the plaintiff during the five years last mentioned.

"16. In determining the payments to be specified in the written agreements relating to the sale of lots in Beverly Shores and Lake Shore obtained by the plaintiff during the years 1933, 1934, 1935, 1936 and 1937, the plaintiff necessarily took into consideration and included in such payments the items of expense referred to in paragraphs 12 and 14 of these Findings of Fact; and included in the payments which the plaintiff received during the years 1935, 1936, and 1937 and which were taxed under the Gross Income Tax Act of 1933, as amended, were sums representing compensation or reimbursement to the plaintiff for the services and items of expense referred to in paragraphs 12 and 14 of these Findings of Fact.

"17. The various lots comprising Beverly Shores and Lake Shore were and are subject to the general property tax of the State of Indiana for state and local purposes, and the amount of such tax levied against such lots while owned by the plaintiff has been duly paid by the plaintiff to the proper officers in Indiana.

"18. At the time the plaintiff acquired Beverly Shores and Lake Shore in 1933 the total purchase price paid by the plaintiff was allocated or spread over the various lots or parcels according to their then comparative values. The cost to the plaintiff and the intrinsic value of the lots covered by the written agreements obtained by the taxpayer during the years 1933, 1934, 1935, 1936 and 1937 did not exceed 20% of the principal payments specified in such written agreements.

"19. During the years 1935, 1936 and 1937 the plaintiff received the following payments at his office in Chicago, Illinois, under written agreements relating to

the sale of lots in Beverly Shores and Lake Shore, which written agreements had been obtained by the plaintiff during the years 1933, 1934, 1935, 1936, and 1937 from the customers and in the manner hereinabove in these Findings of Fact set forth, that is to say: during 1935, $232,355.00 as principal payments and $6,882.00 as interest payments; during 1936, $294,208.08 as principal payments and $18,622.81 as interest payments; and during 1937, $332,988.21 as principal payments and $29,946.72 as interest payments. All of said written agreements were at all times owned by the plaintiff and were physically kept by the plaintiff at his office in Chicago. Not less than 98% of said principal payments and not less than 98% of said interest payments were received by the plaintiff from non-residents of the State of Indiana.

"20. For the years 1935, 1936 and 1937 the plaintiff paid to the State of Indiana the following sums, which were demanded and received by the State of Indiana through the defendants or their predecessors as a purported tax under the Gross Income Tax Act of 1933, as amended, at 1% of said principal and interest payments, that is to say: for 1935, $2,325.55 on account of principal payments, and $68.82 on account of interest payments; for 1936, $2,942.08 on account of principal payments and $186.23 on account of interest payments; and for the year 1937, $3,329.88 on account of principal payments and $299.46 on account of interest payments.

"21. During the taxing periods involved in this case, the plaintiff maintained 'on the spot' what was commonly known as a subdivision office which was located on the subdivision known as Beverly Shores. Such subdivision office was utilized by plaintiff and his agents in their attempts to sell and in selling lots in such subdivisions. Prospective purchasers would call at such subdivision office and make inquiries relative to the prices, the conditions of sale, and other matters relating to the purchase of lots in such subdivisions.

During the years 1933, 1934, 1935, 1936 and 1937 the plaintiff kept at the above-mentioned subdivision office during usual business hours an employee who would answer inquiries and give information to prospective purchasers of lots in Beverly Shores and Lake Shore.

"22. The defendants and their predecessors, in administering and enforcing the Gross Income Tax Act of 1933, both as originally enacted and as amended, have, during the tax periods in question, uniformly allowed the exemptions specified by the Acts and have construed such exemptions as reflected by the Department of Treasury regulation promulgated from time to time, and taxpayers, including citizens of the State of Indiana and non-residents of the State, have followed such regulations in ascertaining their tax liability and exemptions under said Act, and have made their tax returns and payments accordingly.

"23. With reference to the written agreements used by the plaintiff in connection with the sale of lots in Beverly Shores and Lake Shore, the principal sum therein specified to be paid by the purchaser was not designated as the purchase price of land; the purchaser acquired no interest or equity in the Indiana land unless and until he performed all his covenants and made all the payments to be made by him; only upon making the final payment, which occurred in Chicago, Illinois, did the purchaser acquire the equitable ownership of the Indiana property; this final payment was usually followed by the execution and delivery of a deed, in the form in evidence as Plaintiff's exhibits 11 and 12, which transferred to the purchaser the legal title to the land; and this, also, occurred in Chicago, Illinois. Not until the expiration of the term of the written agreement, which was usually five years, and the purchaser made the final payment and an effective conveyance was made to the purchaser, could it be said that any proportion of the payments made by him were, in fact, made as the purchase price of Indiana property. The five-year period

with respect to the written agreements obtained by the plaintiff in the latter part of 1933 would not expire until the latter part of 1938, and the five-year period with respect to the written agreements obtained thereafter would not expire until 1939 or thereafter. However, the State of Indiana, through the defendants or their predecessors, has exacted a tax of one per cent on each and every one of such payments as made in 1935, 1936 or 1937, irrespective of whether the purchaser thereafter defaulted and forfeited his payments and never became entitled to any interest in Indiana property, and irrespective of whether, for any other reason, such purchaser never acquired or became entitled to any interest in Indiana property.

"24. All the gross income of the plaintiff here involved for the years 1935, 1936 and 1937 was received by the plaintiff outside the State of Indiana.

"25. In all cases where title to lots in Beverly Shores and Lake Shore was transferred from the plaintiff to purchasers the final payments were made, the deeds were executed and delivered, and the titles passed, in Illinois, and Illinois was the geographical source of the gross income derived from the sale of such lots.

"26. The Business of the plaintiff was a unitary business conducted in more than one state and all or some substantial part of the gross income of the plaintiff here involved for the years 1935, 1936, and 1937 was attributable to activities or sources outside of Indiana.

"27. The plaintiff in the conduct of this business was exercising rights or privileges protected by the commerce and privilege and immunity clauses of the Federal Constitution against discriminatory action by the State of Indiana or its officials.

"28. The imposition of the Indiana gross income tax, without apportionment, upon all the gross income of the plaintiff here involved for the years 1935, 1936 and 1937 would subject the plaintiff to the risk of multiple tax burdens to which persons in Indiana conducting

a similar business but whose activities did not cross state lines would not be exposed.

"29. The written agreements from which the plaintiff derived the gross income here involved for the years 1935, 1936, and 1937 had their taxable situs outside Indiana.

"30. The defendants and their predecessors in office in administering and enforcing the Gross Income Tax Act of 1933, both as originally enacted and as amended, have, during the years here in question, uniformly exempted many persons, including citizens of Indiana, who were in the same, or substantially the same, position as the plaintiff, insofar as liability for taxes under said Act is concerned.

"31. Within the time required by law the plaintiff duly filed with the proper authorities of the State of Indiana claims for refund in the proper form for the taxes and interest herein involved for the years 1935, 1936 and 1937.

"32. The Court has jurisdiction of the subject matter of these three cases and of all the necessary parties.

Conclusions of Law

"On the facts heretofore specifically found, the court concludes the law to be as follows:

1. The law is with the plaintiff and against the defendants.

2. The taxes exacted by the defendants, or their predecessors in office, from the plaintiff with respect to his gross income herein involved for the years 1935, 1936 and 1937 were improper, illegal and unconstitutional, and should be refunded for the following, among other, reasons: (a) The taxable event specified in the title of the Indiana Gross Income Tax Act, that is, the receipt of such gross income, occurred outside of Indiana, and Section 19 of Article 4 of the Indiana constitution precludes the imposition of the tax on any other taxable event; (b) The geographical source of

such gross income was outside of Indiana; (c) In any event, a fair apportionment of such gross income as between Indiana and other states was necessary, and there is no provision in the law providing for such apportionment; (d) The taxes in question were in substance and effect imposed upon property located, or acts taking place, outside the territorial jurisdiction for Indiana; and (e) The exaction of the taxes in question constituted a discrimination against the plaintiff which the plaintiff is protected by various provisions of the Federal and Indiana constitutions.

3. Plaintiff is entitled to the relief prayed for in his complaints."

The Marion Circuit Court entered judgment for Appellant and ordered repayment of the taxes involved with interest. Appellees appealed to the Supreme Court of Indiana, which reversed with directions to render judgment for and in behalf of Appellees.

The Opinion Below

The opinion of the Supreme Court of Indiana rendered June 19, 1950 is set out in Appendix A attached hereto. It has not yet been officially reported but may be found in 93 N. E. (2d) at page 174.

On July 8, 1950 Appellant filed a petition for a rehearing in the Supreme Court of Indiana which was denied October 4, 1950.

Statutory Provisions Believed to Sustain Jurisdiction

Section 1257 (2) of the Judicial Code (28 USCA 1257 (2)) provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its

being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

State Statute Involved

The State statute involved is the Indiana Gross Income Tax Act of 1933, as amended, Chapter 50, Acts of 1933, State of Indiana, page 388. Section 2 prior to the amendment of 1937 provided:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Section 2 as amended in 1937, effective April 1, 1937, Chapter 117, Acts of 1937, provides:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or busi-

nesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Under Section 3 the applicable rate is 1% if the Act is constitutional as applied to Appellant.

Other sections provided a remedy in cases of improper assessment by payment of the taxes followed by suit for refund, which was the procedure followed by Appellant.

The Act contained no provision for apportionment of gross income derived partly from sources within and partly from sources without the State of Indiana.

Date of Judgment or Decree Sought to Be Reviewed and Date of Presentation of Application for Review

The date of the judgment or decree sought to be reviewed is October 4, 1950, and the date of presentation of the application for review is December 7, 1950.

Finality of Judgment

The Supreme Court of Indiana is the highest Court of that State in which a decision can be had. (Indiana Constitution, Article 7, Sec. 1, *Curless* v. *Watson*, 180 Ind. 86). Upon denial of Appellant's petition for rehearing on October 4, 1950, the judgment became final, and the time for making application for appeal runs from that date. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U. S. B 448, 63 L. Ed. 701.

Origin of the Federal Questions

The complaint filed by Appellant in the Marion Circuit Court, after setting forth the facts substantially as hereinabove set forth, alleged that during 1937 Appellant received $333,827.94 in principal payments, and $29,946.72 in interest payments, on real estate contracts obtained in the manner hereinabove set forth, and that for the year 1937 Appellant paid to the State of Indiana the sum of $3,329.88, which sum was demanded and received as a purported tax of 1% of said sum of $333,827.94 under the Gross Income Tax Act of 1933, as amended, after giving effect to annual exemption; and that for said year Appellant paid the State of Indiana the sum of $299.46, which sum was demanded and received as a purported tax of 1% of the sum of $29,946.72 under said Gross Income Tax Act of 1933, as amended. The complaint further alleged that the collection of said taxes under said Act was improper and illegal in that it violated various provisions of the Constitution of the United States, including Section 8 of Article I relating to commerce, Section 2 of Article IV relating to the privileges and immunities of citizens of the several states, and Section 1 of the Fourteenth Amendment relating to the privileges or immunities of citizens of the United States, due process of law and the equal protection of the laws. (R. 6-34)

The Marion Circuit Court passed upon the Federal questions thus raised.

In the Supreme Court of Indiana Appellees, as proposition 5 of their Brief, contended:

> "The Gross Income Tax Act and the levy of the tax thereby upon Appellee's income herein does not violate any provision of the Indiana Constitution nor the Federal Constitution."

The Supreme Court of Indiana, in its opinion of June 19, 1950, passed upon Federal questions and held the Act did not violate the due process or commerce clause of the Federal Constitution.

In his petition for rehearing filed by Appellant in the Supreme Court of Indiana Appellant alleged that the Gross Income Tax Act of 1933, as amended, as construed and applied by the Supreme Court of Indiana, was unconstitutional and void as violative of the following provisions of the Federal Constitution: The due process clause of the Fourteenth Amendment, Section 8 of Article I relating to commerce, and Section 2 of Article IV relating to privileges and immunities of citizens.

The Questions Involved Are Substantial

A tax on, or measured by, gross receipts is a direct tax and constitutes a direct and immediate burden on the activities or property from which such gross receipts are derived. It is to be distinguished from a tax on net income which is only indirect. *United States Glue Co.* v. *Oak Creek* (1917), 247 U. S. 321, 62 L. ed. 1135.

The written agreements used by Appellant provided:

> "No interest or equity in the real estate shall vest in the Purchaser, nor shall the Purchaser have any right of possession of the real estate without the written permission of the Vendor, until the Purchaser shall have made all the payments and performed all the covenants to be made and performed by the Purchaser hereunder."

Such written agreements also provided that in case of default by the purchaser, the agreement should, at the option of the vendor, be forfeited and determined, and all payments, whether in money or property, should be retained by the vendor as liquidated damages.

The Indiana Supreme Court, in order to sustain the taxes in question, found it necessary to hold that the income here involved consisted entirely of receipts from the sale of lots in Indiana. Such a holding is clearly erroneous.

Appellant's receipts consisted in part of interest on deferred principal payments specified in written agreements which were later forfeited and under which the customer never acquired any interest in Indiana land. Obviously, interest paid where no sale of Indiana land was ever consummated cannot truthfully be said to be receipts from the sale of Indiana land.

Appellant's receipts consisted in part of principal payments specified in written agreements which were later forfeited and under which the customer never acquired any interest in Indiana land. Obviously, such payments where no sale of Indiana land was ever consummated cannot truthfully be said to be receipts from the sale of Indiana land.

Appellant's receipts consisted in part of interest paid on deferred principal payments specified in written agreements which were consummated by the execution and delivery of deeds. These interest payments represented compensation paid by the Illinois purchaser to Appellant for foregoing the immediate collection of the purchase price. The deferred payments were, in effect, loans by Appellant, an Illinois resident, to Illinois borrowers. The interest paid for the privilege of delaying payment of the purchase price cannot truthfully be said to represent the purchase price of Indiana land.

Appellant's receipts consisted in part of principal payments specified in written agreements which were completed by execution and delivery of deeds. The record conclusively establishes that the receipts of this class exceeded the intrinsic value of the lots involved by a substantial amount, and that such excess was attributable to Appel-

lant's interstate and out-of-state activities. This excess can in no true sense be said to consist entirely of receipts from the sale of Indiana land.

Even that portion of the gross receipts of this last-mentioned class equal to the intrinsic value of the lots conveyed cannot be said to be derived from Indiana sources. In so far as there were completed sales of real estate, such sales were consummated and title passed in Illinois. This Illinois transaction, without which there would have been no gross receipts, was the latest in the chain of events that gave rise to the gross receipts. This Illinois transaction was the proximate cause of the gross receipts and Illinois was their geographical source. *Compania General De Tabacos* v. *Collector of Internal Revenue* (1929), 279 U. S. 306, 73 L. Ed. 704; *Porto Rico Mercantile Co.* v. *Gallardo* (1925, 1st), 6 F. (2d) 526; *Tootal Broadhurst Lee Co.* v. *Commissioner of Internal Revenue* (1929 2d), 30 F. (2d) 239, certiorari denied 73 L. Ed. 1000; *Eastman Kodak Co.* v. *District of Columbia* (CCA Dis. Col.), 131 F. (2d) 347; *Birken* v. *Commissioner of Internal Revenue* (1926), 5 B. T. A. 402; *Appeal of Yokohama Ki-Ito Kwaiska Ltd.* (1927), 5 B. T. A. 1248; *R. J. Dorn & Co.* (1928), 12 B. T. A. 1102; *Elston Co. Ltd.* v. *Commissioner of Internal Revenue* (1940), 42 B. T. A. 208; *Balestreri* v. *Commissioner of Internal Revenue* (1942), 47 B. T. A. 241.

As construed and applied by the Indiana Supreme Court the Gross Income Act of 1933, as amended, is unconstitutional and void in the following respects:

(a) The Act violates the due process clause of the Fourteenth Amendment to the Federal Constitution because the business of Appellant was a unitary business, and because a substantial portion of the gross receipts here involved were derived from, or attributable to, activities outside of Indiana. *Altman and Keesling, Allocation of Income in*

State Taxation (1946), Chap. V; *Hans Rees' Sons, Inc.* v. *North Carolina* (1930), 283 U. S. 123, 75 L. Ed. 879; *Porto Rico Mercantile Co.* v. *Gallardo* (1925 C. C. A. 1st), 6 F. (2d) 526; *James* v. *Dravo Contracting Co.* (1937), 302 U. S. 134, 82 L. Ed. 155.

(b) The Act violates Section 8 of Article I of the Federal Constitution relating to commerce because a substantial portion of the gross receipts here involved were derived from, or attributable to, activities in interstate commerce, that is, transportation of prospective purchasers to and from Indiana, and the passage of Appellant, his salesmen and employees to and from Indiana. *J. D. Adams Manufacturing Company* v. *Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince* v. *Henneford* (1939), 305 U. S. 434, 83 L. Ed. 272.

(c) The Act violates Section 2 of Article IV of the Federal Constitution relating to privileges and immunities of citizens, and Section 8 of Article I of the Federal Constitution relating to commerce, because all the receipts here involved could be taxed by the State of Illinois, and the Supreme Court of Indiana has subjected Appellant to the risk of multiple taxes to which persons in Indiana conducting a similar business but whose activities do not cross the State line would not be exposed, thus discriminating against Appellant in favor of similar local businesses. *J. D. Adams Manufacturing* v. *Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince* v. *Henneford* (1939), 305 U. S. 434, 83 L. Ed. 272; *Edwards* v. *California* (1941), 314 U. S. 160, 86 L. Ed. 119; *Crandall* v. *Nevada* (1868), 6 Wall. 35, 18 L. Ed. 745; *Ward* v. *Maryland* (1871), 12 Wall. 418, 20 L. Ed. 449; *Travis* v. *Yale & Towne Manufacturing Co.* (1919), 252 U. S. 60, 64 L. Ed. 460; *Chalker* v. *Birmingham & Northwestern Railway Company* (1918), 249 U. S. 522, 63 L. Ed. 748.

(d) The Act violates the due process clause of the Fourteenth Amendment to the Federal Constitution because it imposes a direct tax on out-of-state activities. *Hans Rees' Sons, Inc.* v. *North Carolina* (1930), 283 U. S. 123, 75 L. Ed. 879; *James* v. *Dravo Contracting Co.* (1937), 302 U. S. 134, 82 L. Ed. 155.

(e) The Act violates Section 8 of Article I of the Federal Constitution relating to commerce and Section 2 of Article IV of the Federal Constitution relating to the privileges and immunities of citizens, because it imposes a direct tax on interstate activities. *J. D. Adams Manufacturing Company* v. *Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince* v. *Henneford* (1939), 305 U. S. 434, 83 L. Ed. 272; *Edwards* v. *California* (1941), 314 U. S. 160, 86 L. Ed. 119; *Crandall* v. *Nevada* (1868), 6 Wall. 35, 18 L. Ed. 745; *Ward* v. *Maryland* (1871), 12 Wall. 418, 20 L. Ed. 449; *Travis* v. *Yale & Towne Manufacturing Co.* (1919), 252 U. S. 60, 64 L. Ed. 460; *Chalker* v. *Birmingham & Northwestern Railway Company* (1918), 249 U. S. 522, 63 L. Ed. 748.

(f) The Act violates the due process clause of the Fourteenth Amendment to the Federal Constitution because it imposes a direct tax on the written agreements from which the gross receipts involved were derived—which written agreements had their situs in Illinois beyond the jurisdiction of Indiana. *State Tax on Foreign-held Bonds* (1872), 15 Wall. 300, 21 L. Ed. 179; *State* v. *Wisconsin Tax Commission* (1915), 161 Wis. 111, 152 N. W. 848; *In Re Eilermann's Estate* (1934), 179 Wash. 15, 35 P. (2d) 763.

Appellant contends the Supreme Court of Indiana erred:

1. In failing to hold that the Gross Income Tax Act of 1933, as amended, if held to authorize the taxes upon Appellant's gross income, would be unconstitutional and void

as violative of the following provisions of the Federal Constitution: The due process clause of the Fourteenth Amendment, Section 8 of Article I relating to commerce and Section 2 of Article IV relating to privileges and immunities of citizens.

2. In stating that the Marion Circuit Court held real estate to be the subject of interstate commerce; in holding that the taxes in question do not violate the due process clause of the Federal Constitution "in that immovable property is exclusively subject to the laws of the government in which it is located;" in holding that the income involved in these proceedings consists entirely of receipts from the sale of lots in Indiana; and in reversing judgment of the Marion Circuit Court with instructions to render judgment for and in behalf of Appellees.

3. In failing to affirm the judgment of the Marion Circuit Court.

The cases above cited sustain the jurisdiction of the Supreme Court of the United States.

Respectfully submitted,

RAYMOND HARKRIDER,
OWEN W. CRUMPACKER,
Counsel for Appellant.

APPENDIX "A"

Come now the parties by counsel and the court being advised in the premises, reverses the judgment of the lower court, with the following opinion pronounced by Young, J., Emmert, C. J. not participating.

This appeal involves three cases from the Marion Circuit Court. Each contains identical issues and by leave of the court they were consolidated for briefing in this court.

The complaints alleged the names of the parties and that the plaintiff, Robert Bartlett is now, and for many years last past has been continuously, a citizen and resident of the City of Chicago, Illinois; that on or about April 27, 1933, he acquired for the purpose of resale the real estate covered by the subdivisions known as Beverly Shores and Lake Shore in Indiana, which land had been laid out into various blocks, lots, steets and alleys; that in the course of selling the lots in said subdivision there was and is no practical market available for said lots in Indiana; that all records and books of account were kept at his office in Chicago, Illinois; that in order for plaintiff to successfully sell lots in Beverly Shores and Lake Shore, and to make collections of the installments of the purchase price, he maintained an office in the City of Chicago; that he created an organization consisting of salesmen, managers, bookkeepers and other employees; that with very few exceptions all employees, other than the salesmen, devoted all their time and efforts outside the State of Indiana; that the cost to plaintiff of selling said lots in said subdivisions, exclusive of the cost of the land sold, amounted to a substantial percentage of the sales price of such lots and became intangible choses in action; that at least 98 per cent of the obligors upon said contracts for the sale of said lots were domiciled in the City of Chicago and a very substantial portion of the activities and expenditures in connection therewith was performed and made outside the State of Indiana; that the sums of money collected are shown and it is alleged that said real estate sales contracts, since their taxable situs was outside the State of Indiana, could not properly or legally be taxed by the State of Indiana, nor could the receipts therefrom, either principal or interest,

properly or legally be taxed by the State of Indiana; that there is a plea for a correction of the amount of taxes paid and the expression of a willingness, without admitting any part of said receipts are properly or legally taxable under the Gross Income Tax of 1933, to pay one per cent upon that portion of said receipts as can reasonably be apportioned to the State of Indiana for taxation under said Act, and to this complaint an answer in denial is filed for and on behalf of the defendants.

A similar complaint was filed in each of the other two cases. There were later motions for substitution of parties defendant. The case was submitted upon a stipulation of facts whereby the allegations tending to support the complaint and the contentions of the parties were set out. There were also findings of fact and conclusions of law, the details of which need not be taken up in the opinion. Judgments were rendered in the three cases and, upon such findings of facts, the court found for the plaintiff and ordered returned to the plaintiff the sums of money which had been paid. There was a motion to modify the judgment and to adopt special findings proposed by the defendant, both overruled. A motion for a new trial was filed, the basis for which, so far as this law suit is concerned, was that the decision of the court was not sustained by sufficient evidence and the decision of the court is contrary to law, which was denied.

The constitutionality of the Indiana Gross Income Tax Law of 1933 has been upheld by both this court and the Supreme Court of the United States. *Miles et al.* v. *Dept. of Treasury* (1935), 209 Ind. 172, 199 N. E. 372, 298 U. S. 640.

The appellant in a general way contends that the receipts of the appellee were strictly from a local activity, to-wit: from the sale of Indiana real estate, the situs of which is in Indiana. The appellee contends that the receipts herein involved were derived from and attributable to activities or sources outside the State of Indiana which the State of Indiana could not properly or legally tax.

The fundamental position of the appellant is that a non-resident of Indiana who undertakes to sell land or real estate in Indiana thereby creates a situation whereby, so

far as appellee is concerned, there was a receipt of income from an Indiana source. The taxable event, as designated in Section 2 of the Gross Income Tax Act is, ". . . Such tax shall be levied upon the entire gross income . . . derived from sources within the State of Indiana of all persons and/or companies, including banks, who are not residents of the State of Indiana but are engaged in business in this state or who derived gross income from sources within the state . . ." Section 64-2602, Burns' 1933. This section of the statute has been construed by this court in the case of *Miles* v. *Dept. of Treasury* (1935), 209 Ind. 172, 188, 199 N. E. 372, 378, 379, 298 U. S. 640, where the following language was used.

> "We conclude that the tax in question is an excise levied upon those domiciled within the State, or who derive income from sources within the State upon the basis of the privilege of domicile, or the privilege of transacting business within the State, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies the tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of the State. We feel that the weight of the reasoning and authority sustains this view."

In the case of *Indiana Creosoting Co.* v. *McNutt* (1936), 210 Ind. 656, 663, 664, 5 N. E. 2d 310, 313, this court used identical language in explanation of the statute.

These cases likewise hold that the taxable contention upon which the gross income tax is assessed, which involves the sale of Indiana real estate, is the fact of sale, and, in further support of this contention, it has been held that executory contracts relating to real estate are governed as to their requisite validity and effect by the law of the place where the real estate is located. *Bethel* v. *Bethel* (1876), 54 Ind. 428, 430; *Robards* v. *Morley* (1881), 80 Ind. 185; *Barnet* v. *Pool* (1859), 23 Texas 517, 521; *Wheeler* v. *Walker* (1879), 64 Ala. 560, 562.

It should also be remembered that contracts between citizens of different states are not subjects of interstate

commerce where the performance of the contract is to be completed and carried out wholly within the borders of the state, even though such contracts may affect interstate commerce, *Ware & Leland* v. *Mobile County* (1908), 209 U. S. 405, 411; *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 253; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.* (1941), 313 U. S. 252; *Department of Treasury* v. *Wood Preserving Corp.* (1941), 313 U. S. 62, and the appellee cannot escape the tax by billing from the outside or by setting up his machinery so that the income from the sale is paid to it from another state. *Department of Treasury* v. *Wood Preserving Corp., supra; Continental Assurance Co.* v. *Tennessee* (1940), 311 U. S. 6; *Gross Income Tax Division* v. *J. L. Cox & Sons* (1949), 86 N. E. 2d 393, 398; *Penn R. R. Co.* v. *Clark Coal Co.* (1915), 238 U. S. 456, 465, 466.

The assessment of gross income tax on the sale of real estate in Indiana does not violate the due process clause of the Federal Constitution in that immovable property is exclusively subject to the laws of the government in which it is located. 15 C. J. S. Conflict-of-Laws, § 19 (2), pp. 936, 937, 938; Restatement, Conflict-of-Laws, § 215, 11 Am. Jur., Conflict-of-Laws, § 30, p. 328; *Fisher* v. *Parry* (1879), 68 Ind. 465, 468; *Bethel* v. *Bethel, supra.* Whether the seller be a resident of Indiana or a resident of the State of Illinois, our gross income tax law provides by § 2 thereof as follows:

> "(f) The term 'gross income', except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received . . . from the *sale of property, tangible or intangible, real or personal,* or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and *without any deductions* on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and *without any deduction on account of losses; . . .*". (Our itals.) Ch. 50 § 1 (f), Acts of 1933; Burns' Ind. Stat. Anno. 64-2601.

Only such commodities as may in the ordinary course of events become subjects of purchase and sale on their movement from one state to another state are articles of commerce under the Commerce Clause of the Constitution, 15 C. J. S. Commerce, § 17, p. 277; *Boddy* v. *Continental Insurance Co.* (1925), 88 So. 294; *Republic Acceptance Corp.* v. *Bennett* (1922), 189 N. W. 901, 220 Mich. 249, and the decision of the lower court, which in this case holds real estate to be the subject of interstate commerce, is not sustained by the authorities. *Munday* v. *Wisconsin Trust Co. et al.* (1920), 252 U. S. 499, 503; *U. S.* v. *Crosby* (1812), 7 Cranch 115, 116; *Blan* v. *Hollywood Realty Co.* (1928), 118 So. 253, 256; 15 C. J. S. Commerce, § 17, p. 277.

In the case of *Munday* v. *Wisconsin Trust Company, supra,* the Supreme Court of Wisconsin had declared null and void two separate deeds executed and delivered in Illinois which undertook to convey real estate in Wisconsin to a Maine corporation, on the ground that said Maine corportation had failed to comply with the Wisconsin statute prescribing conditions under which foreign corporations might acquire title to real estate therein. In the United States Supreme Court an appeal was perfected challenging the decision of the Wisconsin Supreme Court on the basis of Article I, § 10 of the Fourteenth Amendment, and the Commerce Clause of the Federal Constitution. In upholding the decision of the Supreme Court of Wisconsin, the United States Supreme Court had the following to say concerning the objections raised:

> "Obviously, no impairment of any federal right resulted from the construction placed upon § 1770j as amended in 1917. Whether that section did or did not validate a contract theretofore unenforceable was a question for the state court finally to decide—it involved no right under the Constitution or laws of the United States.
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> • • • • • • •
>
> Where interstate commerce is not directly affected, a State may forbid foreign corporations from doing business or acquiring property within her borders

except upon such terms as those prescribed by the Wisconsin statute. *Fritts* v. *Palmer,* 132 U. S. 282, 288; *Chattanooga National Building and Loan Association* v. *Denson,* 189 U. S. 408; *Interstate Amusement Co.* v. *Albert,* 239 U. S. 560, 568.

No interstate commerce was directly involved in the transactions here questioned. Moreover, this court long ago declared: 'The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' *United States* v. *Crosby,* 7 Cranch, 115, 116." (Our italics.)

Ever since the *United States* v. *Crosby* case, *supra,* (7 Cranch 115), as far back as 1812, the United States Supreme Court has held:

> "The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."

The same rule is stated in 15 C. J. S. Conflict-of-Laws, § 19 (a), pp. 936, 937, in the following language:

> "Immovable property is exclusively subject to the laws of the government within whose limits it is located, and it is a rule firmly established by numerous decisions that the law of the jurisdiction in which such property is situated controls and governs its acquisition, disposition, and devolution. This rule, which is embodied in the Restatement, is universal, applying generally to all property classed as immovable, and operates between the several states of the United States as well as between countries entirely foreign to each other. It is not in the power of any state by any legislative act to prescribe the mode in which lands in another state may be disposed of or title thereto passed from one person to another."

U. S. v. *Fox* (1876), 94 U. S. 315, 320, 321.

To bring this document down to a more recent date, the United States Supreme Court in the case of *Curry* v. *Mc-*

Canless (1938), 307 U. S. 357, at p. 363, reiterates this doctrine as follows:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make a disposition of putative rights in them, for *purposes of conflict of laws, and for purposes of taxation,* is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

The meaning of the words "gross income" in the statute has been construed by the Supreme Court of Indiana in the case of *Miles* v. *Department of Treasury, supra,* in the following language: "It is contended that the word 'income,' as used in the title of the act, is not broad enough to cover gross receipts or gross income within the intent of the act. But the term 'gross income' is used in the title. This term is understood by lexicographers, and in common usage, to mean total receipts."

The appellee upon its part takes the position that the taxes are unconstitutional and illegal and argue that a particular lot may cost the subdivider a given price and his sales price must be several times this amount if he is to get back his costs and expenses and realize an all-over profit. They then proceed by figures to show that for a lot which sold for $1,000, only $200 might represent the return to the subdivider for the cost for the lot. And they cite *Crew Levick Company* v. *Commonwealth of Pennsylvania* (1917), 245 U. S. 292, 62 L. Ed. 295, and *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365. These cases simply hold that the taxable event with reference to each case was the receipt of income from the sale of property moving interstate. Then with the citation of these cases, it is stated that it is a fundamental rule that the power of jurisdiction of the state to impose taxes is limited to subjects or objects having their taxable situs within the territorial limits of the taxing state. And in this connection they cite *Gross Income Tax Divison* v. *Fort Pitt Bridge Works* (1949), — Ind. —, 86 N. E. 2d 685, and say that if

a state seeks to tax an act, the act must take place within the territorial limits of the taxing state, which is true, even though inapplicable. They then argue Section 19 of Article 4, of the Indiana Constitution, which reads as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Numerous cases are cited to sustain this contention, which we have examined with some care, and, in our opinion, they are not in point.

Then the appellee turns again to the question of whether or not the gross income from the sales derived from sources within the State of Indiana and not from sources elsewhere. *Compania General De Tabacos* v. *Collector of Internal Revenue* (1929), 279 U. S. 306, 73 L. Ed. 704; *Porto Rico Mercantile Co.* v. *Gallardo* (1925), 6 F. 2d 526; *Tootal Broadhurt Lee Co.* v. *Commissioner of Internal Revenue* (1929), 30 F. 2d 239; *Eastman Kodak Co.* v. *District of Columbia* (1942), (C. C. A. Dist. Col.) 131 F. 2d 347; *Birken* v. *Commissioner of Internal Revenue* (1926), 5 B. T. A. 402; *Appeal of Yokohoma Ki-Ito Kwaisha Ltd.* (1927), 5 B. T. A. 1248; *R. J. Dorn & Co.* (1928) 12 B. T. A. 1102; *Elston Co. Ltd.* v. *Commissioner of Internal Revenue* (1940), 42 B. T. A. 208; *Balestreri* v. *Commissioner of Internal Revenue* (1942), 47 B. T. A. 241.

We will not take the time to analyze these cases, but they are not controlling or persuasive in the case before us. We cannot fail to see that the taxable event in this case was the receipt of income from the sale of lots in Indiana and the taxable income here involved consists entirely of such receipts.

The judgment of the lower court must be reversed and it is so ordered, with instructions to the lower court to render judgment for and in behalf of the appellant.

Emmert, C. J. not participating.

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1950

No. 498-499-500

ROBERT BARTLETT, Both Individually and as Trustee,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

(INDIANA SUPREME COURT CAUSE NO. 28609)

Stipulation as to Printing Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion to Dismiss

Appellant appeals from three judgments of the Supreme Court of Indiana rendered in three cases known, respectively, as Causes Nos. 28609, 28610 and 28611 in the Su-

preme Court of Indiana. The issues in the three cases are the same and involve taxes assessed under the Indiana Gross Income Tax Act of 1933, as amended. Cause No. 28609 involves the year 1935, Cause No. 28610 involves the year 1936, and Cause No. 28611 involves the year 1937. The facts in each case are substantially the same with the exception of the amount of taxes and year involved. The three cases were consolidated in the Indiana Supreme Court for briefing and argument.

With the exception of the amount of taxes and year involved, Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion To Dismiss are the same in each of the three cases.

In order to minimize the work of the Court and avoid duplication in printing, it is stipulated that, if agreeable to the Court and to the Clerk, Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion To Dismiss in Indiana Supreme Court Case No. 28611, only, shall be printed, and that when printed they shall be deemed and considered to be printed copies of Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion To Dismiss in said Cause No. 28609 and also in said Causes Nos. 28610 and 28611.

Dated January 15th, 1951.

Respectfully submitted,

RAYMOND HARKRIDER,
OWEN W. CRUMPACKER,
Counsel For Appellant.

J. EMMETT MCMANAMON,
Attorney General of the State of Indiana.

JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
JOSEPH E. NOWAK,
Deputies Attorney General, Counsel For Appellees.

FILED
JAN 15 1951
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Nos. 498-499-500

ROBERT BARTLETT, BOTH INDIVIDUALLY AND AS TRUSTEE,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA, ET AL.,
Appellee

ON APPEALS FROM THE SUPREME COURT OF INDIANA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

J. EMMETT MCMANAMON,
Attorney General;
JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
JOSEPH E. NOWAK,
Deputies Attorney General,
State of Indiana,
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Nos. 498-499-500

ROBERT BARTLETT, BOTH INDIVIDUALLY AND AS TRUSTEE,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA, ET AL.,
Appellee

ON APPEALS FROM THE SUPREME COURT OF INDIANA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

MAY IT PLEASE THE COURT:

The Gross Income Tax Division, State of Indiana, appellee herein, for its Statement Opposing Jurisdiction and in support of its Motion to Dismiss, respectfully shows to this Honorable Court: *

I

The Nature of the Action

This action, commenced in the Marion Circuit Court of Marion County, Indiana (19th Judicial Circuit of Indiana),

* (Clerk's Note.—See stipulation as to printing statements opposing jurisdiction and motions to dismiss—printed as appendix hereto.)

and thereafter appealed to the Supreme Court of Indiana, is an action to recover taxes assessed and collected by appellee for the year 1937, under the Indiana Gross Income Tax Act of 1933, and that Act as amended by Chapter 117 of the Indiana Acts of 1937. (Indiana Acts of 1933, Chapter 50, p. 388, and Indiana Acts of 1937, Chapter 117, p. 604).

II

Condensed Recital of Facts

The entire evidence in this cause of action consists of agreed Stipulations of Fact and Exhibits thereto, which the appellee hereinafter condenses for the purpose of brevity, and which said condensation contains all facts material to the question sought to be presented, and is as follows:

During the taxable period herein involved:

1. The Department of Treasury was the agency of the State of Indiana charged with the administration and enforcement of the Gross Income Tax Law of Indiana. The appellee, Gross Income Tax Division, is a legal entity now charged with the administration and enforcement of said Act and is the successor to the former Department of Treasury.

2. The appellant, Robert Bartlett, both individually and as trustee, was a resident of and domiciled in the State of Illinois, acting as trustee pursuant to two separate agreements, and as such was engaged in the sale of real estate with his principal office in Chicago, Illinois.

3. Said appellant became the owner by purchase in former years of real estate located wholly within the confines of the State of Indiana, which said real estate was known as the "Beverly Shores Addition" and the "Lake Shore Addition," which said Additions had, prior to purchase, been subdivided into lots for the purpose of sale and certain improvements made thereon.

4. Said appellant maintained an "on the spot" office in Indiana real estate, which said office was kept open during business hours by agents and employees of the appellant.

5. Said Indiana lots were sold both for cash and pursuant to real estate installment sales contracts.

6. Pursuant to the terms of said real estate installment sales contracts, appellant-vendor covenanted and agreed to convey or cause to be conveyed to the purchaser in fee simple by a trustee's deed specific real estat by Lot and Block number with legal description, all of hich said described real estate was in Indiana, subject certain restrictions and covenants, each of which was to be construed as a covenant running with the land and also subject to encumbrances such as taxes, zoning laws, etc.

7. Pursuant to the terms of said real estate installment sales contracts, appellant-vendor received interest payments on the unpaid balance of the purchase price, together with said principal installment payments.

8. Upon full payment, conveyance was made to the purchaser of the particular Indiana real estate by a general warranty deed in accordance with and pursuant to the terms and cor litions of said real estate installment sales contracts.

9. The execution of said real estate installment sales contracts, the payments thereon, and the execution of deeds upon full payment, all occurred in the City of Chicago, Illinois.

10. All deeds, as required by statute, were recorded in Indiana.

11. Not less than 98% of the purchasers of said Indiana lots were non-residents of Indiana living in or near Chicago, Illinois, and not less than 98% of the total gross receipts from the sale of said Indiana lots were received by the appellant from non-residents of the State of Indiana.

12. Notwithstanding said "on the spot" office in Indiana, to effect the sale of said Indiana lots, appellant

incurred considerable operational expense in connection with his Chicago office for salaries of employees and salesmen, office overhead, etc., and transportation costs in transporting prospective purchasers to said lot sites in Indiana.

13. Within the statutory period, upon the entire gross receipts from said sales of Indiana real estate, the appellee levied, assessed and collected Gross Income Tax in accord with the applicable provisions, rates and exemptions of the Gross Income Tax Law, and said tax was paid by the appellant under protest.

14. Within the applicable time allowed by statute, the appellant filed his Claim for Refund for a recovery of the entire tax so paid, which said Claim for Refund, after a hearing, was denied by the appellee.

III

The Statute Involved

The statute involved is the Indiana Gross Income Tax Law of 1933 (Chapter 50, Indiana Acts of 1933, p. 388) and that Act as amended by Chapter 117, Indiana Acts of 1937, p. 604. This statute as now amended may be found complete with all amendments to date in Burns' Indiana Statutes Annotated, 1933, Vol. 11, (1943 Replacement) Section 64-2601 to 64-2635, inclusive.

IV

The Opinion Below

The opinion, decision, and judgment of the Indiana Supreme Court, as yet unreported officially, is unofficially reported in 93 N. E. (2d) 174 of the West Reporter System.

V

The Inadequacy of Appellant's "Assignment of Errors"

While the appellee will hereinafter discuss the absence of a substantial Federal question, it should first be stated that the appellee seriously doubts the sufficiency of appellant's "Assignment of Errors" to present any question to this Honorable Court, for the reason that said "Assignment of Errors" does not conform to the requisites of Rule 9 of the Supreme Court of the United States. Appellee refers specifically to that portion of Rule 9 which requires that said "Assignment of Errors" "shall set out separately and particularly each error asserted."

Careful analysis of appellant's "Assignment of Errors" discloses the following:

(a) Specification No. 1 is a colossal undertaking, attempting to embrace in one specification and sentence, three of the most studied, discussed, and litigated provisions of the Constitution of the United States, i. e., the due process clause, the commerce clause, and the equal privileges and immunities clause. These three alleged errors are not "set out separately and particularly". Instead, they are combined and without any degree of particularity. They are stated in the most general, vague, and indefinite manner possible. At best, they are no more than bare and indefinite conclusions, and do not present clear, concise, separate and particular statements of the material points upon which the appellant intends to rely.

(b) Specification No. 2 likewise combines several separate and distinct alleged errors. These alleged errors are also general, vague and uncertain and do not state with sufficient particularity the material points upon which the appellant intends to rely. This specification is a conglomeration of several varied, general and indefinite alleged errors and does not "set out

separately and particularly each error asserted", as required by Rule 9 of the Supreme Court of the United States.

(c) Specification No. 3 is barren of any element, fact or law upon which a substantial Federal question could possibly be founded, and is couched in the greatest degree of generality imaginable.

It would seem to the appellee that appellant's "Assignment of Errors" completely ignores and fails to conform to the requirements of Rule 9 of the Supreme Court of the United States as construed by this Honorable Court in the case of *Seaboard Air Line Ry.* v. *Watson* (1932), 287 U. S. 86, at p. 91, and kindred cases, and as explained in the recent treatise "Supreme Court Practice" by Robert L. Stern and Eugene Gressman at pp. 210 and 211 thereof.

Appellant's "Assignment of Errors", as filed in the Supreme Court of Indiana on December 7, 1950, and as served upon appellee on the same date, and as will be found in the Transcript of the Record in this appeal, omitting caption and signatures only, is verbatim, as follows:

"Assignment of Errors

"In support of his Petition for Appeal to the Supreme Court of the United States, Robert Bartlett, both individually and as Trustee, Appellant in said appeal, assigns the following errors:

The Supreme Court of Indiana erred:

1. In failing to hold that the gross income Tax Act of 1933, as amended, if held to authorize the taxes upon Appellant's gross income, would be unconstitutional and void as violative of the following provisions of the Federal Constitution; the due process clause of the Fourteenth Amendment, Section 8 of Article I relating to commerce, and Section 2 of Article IV relating to privileges and immunities of citizens.

2. In stating that the Marion Circuit Court held real estate to be the subject of interstate commerce; in holding that the taxes in question do not violate the due process clause of the Federal Constitution "in that immovable property is exclusively subject to the laws of the government in which it is located"; in holding that the income involved in these proceedings consists entirely of receipts from the sale of lots in Indiana; and in reversing the judgment of the Marion Circuit Court with instructions to render judgment for and in behalf of appellees.

3. In failing to affirm the judgment of the Marion Circuit Court.

WHEREFORE, Appellant prays that the judgment or decree of the Supreme Court of Indiana appealed from be reversed and for such further and other relief as the Court may deem fit and proper."

VI

No Substantial Federal Question Is Presented by the Attempted Appeal

The appellee, Gross Income Tax Division, earnestly believes that a consideration of certain basic, long established principles will show beyond any doubt, that there is no substantial Federal question presented by this attempted appeal. These principles, upon which the appellee relies in opposing the jurisdiction of this Honorable Court, are as follows:

A

THE LEVY OF THE TAX HEREIN DOES NOT VIOLATE THE COMMERCE CLAUSE

1. The gross income herein taxed was derived solely from the sale of Indiana land. The source or origin of the gross receipts was Indiana land, and, like the

land, the source was immovable. The land and the source were one and the same. Being immovable, real estate is not a subject of interstate commerce.

U. S. v. *Crosby* (1812), 7 Cranch 115, at p. 116;
Munday v. *Wisconsin Trust Co. et al.* (1920) 252 U. S. 499, at p. 503;
Blan v. *Hollywood Realty Co.*, (1928) 118 So. 253; at p. 256;
15 C. J. S. Commerce, Section 17, pp. 277, 278.

(It will be noted that all case authorities relied upon by appellant on the subject of source, relate to *movable* tangible personal property).

2. The mere fact that the appellant and 98% of the purchasers of his Indiana land were non-residents of the State of Indiana is not of itself controlling: The element of residence of the contracting parties is not determinative. "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question."

Western Live Stock v. *Bureau* (1938) 303 U. S. 250, at p. 253, and cases there cited.

In the case herein, the basic performance required of appellant was the transfer of possession of and title to specific Indiana real estate. Possession by the purchaser could be acquired only at the land site in Indiana, and the transfer of title was valid as to third persons only upon recordation in the County in Indiana in which said real estate was located.

3. The sale of the Indiana real estate herein involved, being basically a local-Indiana-transaction, could not be transformed into an interstate commerce transaction by the form of the contract utilized. In determining whether or not an activity is interstate or local, the matter is a practical one in which *substance*, and not form, controls.

15 C. J. S. Commerce, Section 18, pp. 278, 279.

"• • • it is not within the power of the parties by the form of their contract to convert what was exclusively a local business subject to state control, into an interstate commerce business protected by the Commerce Clause."

Browning v. *Waycross* (1914) 233 U. S. 16 at p. 23.

"Real estate is sold and transferred by the execution and delivery of a deed from the vendor to the vendee; *yet no one would seriously contend that in such a transaction the vendor was selling a deed instead of selling real estate.*" (Emphasis ours.)

Brown v. *Cummins Distilleries Corp.* (1944) 53 Fed. Supp. 659, at p. 664.

4. The out-of-state expense items were but incident to the purely local activity of selling Indiana Real Estate.

Dept. of Treasury v. *Ingram-Richardson Mfg. Co.* (1941) 313 U. S. 252, at p. 255.

5. The possibility of multiple taxation is non-existent.

Senior v. *Braden* (1935) 295 U. S. 422.

6. Since the income herein taxed was derived solely from sources within the State of Indiana, there is nothing to apportion between Indiana and other states.

Dept. of Treasury v. *Wood Corp.* (1941) 313 U. S. 62 at p. 67.

B

THE LEVY OF THE TAX HEREIN DOES NOT VIOLATE THE EQUAL PRIVILEGES AND IMMUNITIES CLAUSE

7. The Record herein will show conclusively that the appellant, a non-resident of the State of Indiana, acquired said Indiana real estate, enjoyed the privileges of ownership thereof, and was accorded the rights of

disposition thereof on the same and equal footing as if he were an Indiana resident.

8. Both the Gross Income Tax Law of 1933, and its administration and enforcement treat residents and non-residents alike under the same circumstances.

Section 2 of the Gross Income Tax Law, Chapter 50 of the Indiana Acts of 1933, and said section of Chapter 117 of the Indiana Acts of 1937, Burns' Indiana Statutes Annotated (1933) Section 64-2602, provide as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

"Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be

> in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Act, both as originally enacted in 1933 and as amended in 1937, thus taxes non-residents only upon their income from sources within Indiana.

Shaffer v. Carter (1920) 252 U. S. 37, at pp. 52, 57.

Regulation 193, Rule 6 of the Gross Income Tax Regulations, revised in 1935, provides:

> "6. Sale of Real Estate Located Outside of Indiana. Persons resident and/or domiciled in Indiana will not be required to report and pay tax upon any of the proceeds from the sale of real estate owned by them and situated in states other than the State of Indiana."

Also Regulation 3500, Rule 6, of the Gross Income Tax Regulations revised in 1937, provides:

> "Rule 6—Sale of Real Estate Located Outside of Indiana. Persons resident and/or domiciled in Indiana will not be required to report and pay tax upon any of the proceeds from the sale of real estate owned by them and situated in states other than the State of Indiana."

These Regulations deal only with income of residents *from sources outside-of-the State of Indiana.* They are clearly for the purpose of placing *residents of Indiana on an equal footing with non-residents,* since, of course, Indiana has no jurisdiction over real estate located in other states. A similar Regulation is not required for non-residents for the simple reason that the Gross Income Tax Law itself as to non-residents imposes the tax only upon their income from Indiana sources.

The rates and exemptions, both in the original and amended Act, are imposed and applied alike as to both residents and non-residents. There is no rate nor exemption based upon the residence or non-residence of the taxpayer.

Regulation 3600 of the Regulations of the Gross Income Tax Division, as revised in 1937, provide as follows:

> "Regulation 3600. Extent of Tax Liability of Non-Residents. Section 2 of the gross income tax Act provides that the tax shall be imposed upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana. *Since non-residents are entitled to the same annual exemption as residents,* therefore they will be liable for making return of and payment of tax upon all gross receipts derived from Indiana sources in excess of $1,000 in any calendar year." (Emphasis ours)

The appellant admitted by agreed Stipulation B, Par. M, as found in the Record, as follows:

> "The Department of Treasury of the State of Indiana in administering and enforcing the Gross Income Tax Act of 1933, both as originally enacted and as administered, has, during the tax years in question, *uniformly allowed the exemptions specified by the Act.* * * *" (Emphasis ours)

Compare: *Travis* v. *Yale & Towne Mfg. Co.* (1920) 252 U. S. 60 at p. 80.

Section 2 of Article IV of the United States Constitution means that a *citizen of Illinois* is entitled to acquire, own, and dispose of property *in Indiana* on the same basis as *citizens of Indiana* are permitted to acquire, own, and dispose of property *in Indiana.* So long as *citizens and non-citizens* are treated equally with reference to the land *in Indiana,* as was done in this case, there cannot possibly be any infringements upon the guarantees of Section 2 of Article IV of the Constitution of the United States.

Appellant's theory of equalization between residents and

non-residents would in reality discriminate *in favor of non-residents and against residents. It would exempt non-residents* from the tax on their gross receipts derived *from the sale of Indiana land,* while imposing such a tax upon *Indiana residents* on income *from the same source.*

Likewise, since the Act allows no deductions of expenses, the appellant's Illinois operational expenses cannot be deducted. He is treated precisely as Indiana residents. To allow said deductions to appellant would, in effect, make the tax a *net* income tax as to *non-residents* and a *gross* income tax as to *residents.*

Nor is an apportionment based upon said Illinois operational expenses justifiable for to so allow would in effect make the sale of *Indiana real estate* by *non-residents* an *interstate* sale, yet the sale of *Indiana real estate* by *Indiana residents* would be a *local* Indiana sale.

Section 2 of Article IV of the Federal Constitution does not give to citizens of other states greater privileges in a particular State than those enjoyed by citizens of that State.

C

The Levy of the Tax Herein Does Not Violate the Due Process Clause

9. The Illinois events do not destroy the nexus between the tax and the gross income from the sale of Indiana real estate.

> "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less *merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that the tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transac-*

tions within a state for which the tax is an exaction.'' (Emphasis ours)

Wisconsin v. *J. C. Penney Co.* (1940) 311 U. S. 435, at pp. 444, 445, and cases there cited.

10. The fact that it required the personal skill and management of appellant to bring his income from Indiana real estate to fruition, *and that his management was exerted from a place of business in another State, does not deprive Indiana of jurisdiction to tax the income which arose within its own borders.* The personal element, cannot, *by any friction,* oust the jurisdiction of the State within which the income actually arises and whose authority over it operates *in rem.*

Shaffer v. *Carter* (1920) 252 U. S. 37, at p. 55.

The sales of appellant's Indiana real estate could have been handled completely by his "on the spot" Indiana office.

11. Indiana real estate, being the source of the income herein taxed and being immovable property, is exclusively subject to the laws of Indiana as respects its acquisition, disposition, devolution, and taxation. (lex loci rei sitae).

15 C. J. S. Conflict of Laws. Section 19 (a), pp. 936, 937, 938.

Restatement, Conflict of Laws, Section 215 et seq.

11 Am. Jur. Conflict of Laws, Section 30, p. 328.

United States v. *Fox* (1876) 94 U. S. 315, at pp. 320, 321.

Curry v. *McCanless* (1938) 307 U. S. 357, at p. 363.

12. Indiana's right to tax the income from the sale of Indiana real estate is closely akin to the right to tax the real estate itself.

Dravo Contracting Co. v. *James* (1940) 114 Fed. (2d) 242, at p. 245.

12. *The contract payments were not the repayment of borrowed money.* The purchaser did not borrow money from the appellant-vendor. The purchase price was a *present value* figure. Since this price was not paid upon the execution of the agreement, the appel-

lant-vendor was entitled to interest on the unpaid balance so that he would receive the equivalent of the *present value* through deferred payments. In other words, the scheme was merely the *amortization* of a *contingent liability.* It was *not a fixed liability as in the case of borrowed money.* The purchaser could default, and his only liability was that past payments were thereby forfeited as liquidated damages. The interest was merely a finance charge and *an incident of an indivisible contract for the sale of Indiana real estate. Thus, both the principal and interest payments were inseparably related to an Indiana real estate sale.*

The appellee, Gross Income Tax Division, earnestly believes that the appellant's "Assignment of Errors" does not adequately present any question for review by this Honorable Court as required by Rule 9 of the Rules of the Supreme Court of the United States, and further asserts that the questions attempted to be presented do not raise any substantial Federal question.

We further submit that the questions attempted to be presented in this appeal, have long ago been so definitely determined, that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that the within appeal be dismissed and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

J. EMMETT MCMANAMON,
Attorney General,
JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
JOSEPH E. NOWAK,
Deputies Attorney General,
Attorneys for Appellee.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1950

No. 498, 499, 500

ROBERT BARTLETT, Both Individually and as Trustee, Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, Appellees

On Appeal from the Supreme Court of the State of Indiana

(Indiana Supreme Court Cause No. 28610)

Stipulation as to Printing Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion to Dismiss

Appellant appeals from three judgments of the Supreme Court of Indiana rendered in three cases known, respectively, as Causes Nos. 28609, 28610 and 28611 in the Supreme Court of Indiana. The issues in the three cases are the same and involve taxes assessed under the Indiana Gross Income Tax Act of 1933, as amended. Cause No. 28609 involves the year 1935, Cause No. 28610 involves the year 1936, and Cause No. 28611 involves the year 1937. The facts in each case are substantially the same with the excep-

tion of the amount of taxes and year involved. The three cases were consolidated in the Indiana Supreme Court for briefing and argument.

With the exception of the amount of taxes and year involved, Appellant's Jurisdictional Statement and Appellee's Statement Opposing Jurisdiction and Motion To Dismiss are the same in each of the three cases.

In order to minimize the work of the Court and avoid duplication in printing, it is stipulated that, if agreeable to the Court and to the Clerk, Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion To Dismiss in Indiana Supreme Court Case No. 28611, only, shall be printed, and that when printed they shall be deemed and considered to be printed copies of Appellant's Jurisdictional Statement and of Appellees' Statement Opposing Jurisdiction and Motion To Dismiss in said Cause No. 28609 and also in said Causes Nos. 28610 and 28611.

Dated January 15th, 1951.

Respectfully submitted,

RAYMOND HARKRIDER,
OWEN W. CRUMPACKER,
Counsel for Appellant

J. EMMETT MCMANAMON,
Attorney General for the State of Indiana;

JOHN J. MCSHANE,
LLOYD C. HUTCHINSON,
JOSEPH E. NOWAK,
Deputies Attorney General
Counsel for Appellees

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No.

ROBERT BARTLETT, Both Individually and as Trustee,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Appellees.

On Appeal From The Supreme Court Of The State Of Indiana
(Indiana Supreme Court Cause No. 28609)

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

On December 20, 1950 Appellees served upon Appellant's counsel their Statement Opposing Jurisdiction And Motion To Dismiss.

Pursuant to Rules 12(3) and 7(3) of the Supreme Court of The United States, as amended, Appellant files this opposing Brief.

I.

Appellees' Condensed Recital Of Facts.

The Condensed Recital Of Facts contained in Appellees' Motion is wholly insufficient. It omits many material facts found in the Stipulations of Fact signed by Appellees' counsel and filed in the Marion Circuit Court, which are embodied in Findings of Fact made by that Court. These Findings of Fact are set forth verbatim in Appellant's Statement As To Jurisdiction.

Paragraph 5 of Appellees' Condensed Recital Of Facts might be misleading because Appellees' transactions were made on the installment basis "with the exception of a very few cash deals." (See paragraph 8 of Findings of Fact of Marion Circuit Court).

As to paragraph 10 of Appellees' Condensed Recital Of Facts, there is nothing in the record to support the assertion that "all deeds, as required by statute, were recorded in Indiana." It was stipulated by Appellees' counsel, and the Marion Circuit Court found:

> "As the agreements were paid up, deeds in the form in evidence as Plaintiff's Exhibits 11 and 12 were executed in Chicago, Illinois, and delivered in Chicago, Illinois, by the plaintiff to the persons entitled thereto, and the grantees attended to the recording of the deeds in the appropriate County in Indiana if such grantees desired to record their deeds."

Moreover, there is no Indiana statute which "required"

such deeds to be recorded. Delivery of the deeds in Chicago, Illinois, passed title. *Armstrong* v. *Azimon* (1948), 76 N.E. (2d) 692; *Blair* v. *Whitaker* (1903), 31 Ind. App. 664, 69 N.E. 182; *Shirk* v. *Thomas* (1889), 121 Ind. 147; 22 N.E. 976.

Many material facts are either not referred to at all in Appellees' Condensed Recital of Facts, or are inadequately set forth. Examples are the facts found in paragraphs 11, 12, 13, 14, 15, 16, 18, 23, 25, 26 and 29 of the Findings of Fact made by the Marion Circuit Court. We respectfully refer the Court to those Findings.

II.

Appellant's Assignment Of Errors.

This Court has on several occasions discouraged numerous, lengthy and repetitious assignments of error. (*Phillips* v. *Seymour* (1875), 91 U.S. 646; 23 L. Ed. 341; *Central Vermont Ry.* v. *White* (1914), 238 U.S. 507, 59 L. Ed. 1433; *Chesapeake and Del. Canal Co.* v. *United States* (1918) 250 U.S. 123; 63 L. Ed. 889). In *Local 167* v. *United States* (1933), 291 U.S. 293; 78 L. Ed. 804 this Court warned that violation of the rule against prolixity in assignments may in the future be taken as sufficient ground for dismissal of the appeal.

Under Rule 27(6) the Court may notice plain error even though not assigned or specified.

The object of the rule relating to assignment of errors is to enable the Court and opposing counsel to see on what points appellant's counsel intend to ask a reversal of the judgment and to limit the discussion to those points. (*Phillips* v. *Seymour, supra*) It is at once apparent from the discussion contained under subheads A, B and C of heading VI of Appellees' Statement Opposing Jurisdiction And Motion To Dismiss that Appellant's assignments have

enabled opposing counsel to see on what points Appellant's counsel intend to ask a reversal of the judgment below.

III.

The Record Presents Substantial Federal Questions.

This appeal presents an unusual fact situation never before presented to this Court. The following, among other, facts have been stipulated as correct by Appellees' counsel:

1. Appellant is a citizen of the United States and of the State of Illinois, is a *bona fide* resident of Chicago, Illinois, and his principal office and place of business has always been located in Chicago, Illinois.

2. In 1933 Appellant acquired the subdivisions known as Beverly Shores and Lake Shore located in Indiana on the Southern Shore of Lake Michigan, about 35 miles from Chicago, Illinois. At the time Appellant acquired these properties they had been subdivided into numerous lots, some of which had been sold and conveyed and others were subject to outstanding sales agreements. This land was suitable primarily for modest homes and cottages used mainly for vacation or resort purposes. There was practically no market for the lots in Indiana, the only available market being in the metropolitan district of Chicago.

3. The entire office force of Appellant (with possibly one or two exceptions) were non-residents of Indiana and worked at or from Appellant's Chicago office. Appellant had no bank account in Indiana, and kept none of his books or records in Indiana.

4. The written agreements used by Appellant provided that the purchaser should acquire no interest or equity in the real estate until the purchaser made all the payments and performed all of the covenants to be made and performed by the purchaser. The agreements provided that

the purchase price should be paid in installments over a period averaging five years with interest at 6% per year commencing either one or two years after the date of the agreement.

5. In order for Appellant successfully to obtain the written agreements, and make collections thereon, he had to maintain his Chicago office and organization; he had to engage in extensive activities outside the State of Indiana; and he had to engage in interstate activities, that is, transportation of prospective purchasers to and from Indiana, and the passage of Appellant, his salesmen and employees to and from Indiana.

6. It is a fact, and so stipulated by Appellees' counsel, that if Appellant had not engaged in these extensive out-of-state activities and interstate activities he would not have been able to obtain any written agreements relating to the sale of lots excepting for payments which would have equalled only a small percentage of the payments specified in the written agreements actually obtained as a result of the out-of-state and interstate activities.

7. The cost to Appellant and the intrinsic value of the lots did not exceed 20% of the principal payments specified in the written agreements.

8. All of Appellant's gross income was received by him outside the State of Indiana, and not less than 98% of such gross income was received from non-residents of Indiana.

9. All the written agreements were executed outside of Indiana and were physically kept outside of Indiana.

10. All deeds were executed and delivered in Illinois.

11. The costs and expenses of Appellant (exclusive of the cost of the lots) aggregated not less than 50% of the principal payments collected by him.

12. The taxes in question were exacted from Appellant

on the principal and interest payments when received by Appellant, even though the purchaser thereafter defaulted and never acquired any interest in Indiana land.

From the foregoing it is apparent that, even in those cases where the purchaser made all payments and later received a conveyance, a very substantial portion of Appellant's gross receipts were due to his out-of-state and interstate activities and only a minor portion represented the intrinsic value of the land transferred. It is also apparent that 100% of such gross receipts were subject to taxation in the State of Illinois where Appellant resided and conducted his business. Appellant is thus subjected to the risk of multiple taxes to which residents of Indiana conducting a similar business, but whose activities do not cross the State line, would not be exposed.

The question of whether Indiana can tax such gross receipts consistently with the due process clause of the Fourteenth Amendment to the Federal Constitution, Section 8 of Article I relating to commerce and Section 2 of Article IV relating to privileges and immunities of citizens, is a novel and substantial one. Prior decisions of this Court referred to in Appellant's Statement As To Jurisdiction indicate a negative answer.

Respectfully submitted,

(Raymond Harkrider)
38 South Dearborn Street
Chicago, Illinois

(Owen W. Crumpacker)
Hammond Building
Hammond, Indiana
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No.

ROBERT BARTLETT, Both Individually and as Trustee,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Appellees.

On Appeal From The Supreme Court Of The State Of Indiana
(Indiana Supreme Court Cause No. 28610)

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

On December 20, 1950 Appellees served upon Appellant's counsel their Statement Opposing Jurisdiction And Motion To Dismiss.

Pursuant to Rules 12(3) and 7(3) of the Supreme Court of The United States, as amended, Appellant files this opposing Brief.

I.

Appellees' Condensed Recital Of Facts.

The Condensed Recital Of Facts contained in Appellees' Motion is wholly insufficient. It omits many material facts found in the Stipulations of Fact signed by Appellees' counsel and filed in the Marion Circuit Court, which are embodied in Findings of Fact made by that Court. These Findings of Fact are set forth verbatim in Appellant's Statement As To Jurisdiction.

Paragraph 5 of Appellees' Condensed Recital Of Facts might be misleading because Appellees' transactions were made on the installment basis "with the exception of a very few cash deals." (See paragraph 8 of Findings of Fact of Marion Circuit Court).

As to paragraph 10 of Appellees' Condensed Recital Of Facts, there is nothing in the record to support the assertion that "all deeds, as required by statute, were recorded in Indiana." It was stipulated by Appellees' counsel, and the Marion Circuit Court found:

> "As the agreements were paid up, deeds in the form in evidence as Plaintiff's Exhibits 11 and 12 were executed in Chicago, Illinois, and delivered in Chicago, Illinois, by the plaintiff to the persons entitled thereto, and the grantees attended to the recording of the deeds in the appropriate County in Indiana if such grantees desired to record their deeds."

Moreover, there is no Indiana statute which "required"

such deeds to be recorded. Delivery of the deeds in Chicago, Illinois, passed title. *Armstrong* v. *Azimon* (1948), 76 N.E. (2d) 692; *Blair* v. *Whitaker* (1903), 31 Ind. App. 664, 69 N.E. 182; *Shirk* v. *Thomas* (1889), 121 Ind. 147; 22 N.E. 976.

Many material facts are either not referred to at all in Appellees' Condensed Recital of Facts, or are inadequately set forth. Examples are the facts found in paragraphs 11, 12, 13, 14, 15, 16, 18, 23, 25, 26 and 29 of the Findings of Fact made by the Marion Circuit Court. We respectfully refer the Court to those Findings.

II.

Appellant's Assignment Of Errors.

This Court has on several occasions discouraged numerous, lengthy and repetitious assignments of error. (*Phillips* v. *Seymour* (1875), 91 U.S. 646; 23 L. Ed. 341; *Central Vermont Ry.* v. *White* (1914), 238 U.S. 507, 59 L. Ed. 1433; *Chesapeake and Del. Canal Co.* v. *United States* (1918) 250 U.S. 123; 63 L. Ed. 889). In *Local 167* v. *United States* (1933), 291 U.S. 293; 78 L. Ed. 804 this Court warned that violation of the rule against prolixity in assignments may in the future be taken as sufficient ground for dismissal of the appeal.

Under Rule 27(6) the Court may notice plain error even though not assigned or specified.

The object of the rule relating to assignment of errors is to enable the Court and opposing counsel to see on what points appellant's counsel intend to ask a reversal of the judgment and to limit the discussion to those points. (*Phillips* v. *Seymour, supra*) It is at once apparent from the discussion contained under subheads A, B and C of heading VI of Appellees' Statement Opposing Jurisdiction And Motion To Dismiss that Appellant's assignments have

enabled opposing counsel to see on what points Appellant's counsel intend to ask a reversal of the judgment below.

III.

The Record Presents Substantial Federal Questions.

This appeal presents an unusual fact situation never before presented to this Court. The following, among other, facts have been stipulated as correct by Appellees' counsel:

1. Appellant is a citizen of the United States and of the State of Illinois, is a *bona fide* resident of Chicago, Illinois, and his principal office and place of business has always been located in Chicago, Illinois.

2. In 1933 Appellant acquired the subdivisions known as Beverly Shores and Lake Shore located in Indiana on the Southern Shore of Lake Michigan, about 35 miles from Chicago, Illinois. At the time Appellant acquired these properties they had been subdivided into numerous lots, some of which had been sold and conveyed and others were subject to outstanding sales agreements. This land was suitable primarily for modest homes and cottages used mainly for vacation or resort purposes. There was practically no market for the lots in Indiana, the only available market being in the metropolitan district of Chicago.

3. The entire office force of Appellant (with possibly one or two exceptions) were non-residents of Indiana and worked at or from Appellant's Chicago office. Appellant had no bank account in Indiana, and kept none of his books or records in Indiana.

4. The written agreements used by Appellant provided that the purchaser should acquire no interest or equity in the real estate until the purchaser made all the payments and performed all of the covenants to be made and performed by the purchaser. The agreements provided that

the purchase price should be paid in installments over a period averaging five years with interest at 6% per year commencing either one or two years after the date of the agreement.

5. In order for Appellant successfully to obtain the written agreements, and make collections thereon, he had to maintain his Chicago office and organization; he had to engage in extensive activities outside the State of Indiana; and he had to engage in interstate activities, that is, transportation of prospective purchasers to and from Indiana, and the passage of Appellant, his salesmen and employees to and from Indiana.

6. It is a fact, and so stipulated by Appellees' counsel, that if Appellant had not engaged in these extensive out-of-state activities and interstate activities he would not have been able to obtain any written agreements relating to the sale of lots excepting for payments which would have equalled only a small percentage of the payments specified in the written agreements actually obtained as a result of the out-of-state and interstate activities.

7. The cost to Appellant and the intrinsic value of the lots did not exceed 20% of the principal payments specified in the written agreements.

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From the foregoing it is apparent that, even in those cases where the purchaser made all payments and later received a conveyance, a very substantial portion of Appellant's gross receipts were due to his out-of-state and interstate activities and only a minor portion represented the intrinsic value of the land transferred. It is also apparent that 100% of such gross receipts were subject to taxation in the State of Illinois where Appellant resided and conducted his business. Appellant is thus subjected to the risk of multiple taxes to which residents of Indiana conducting a similar business, but whose activities do not cross the State line, would not be exposed.

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OCTOBER TERM, A. D. 1950.

No.

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On Appeal From The Supreme Court Of The State Of Indiana
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(Raymond Harkrider)
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Chicago, Illinois

(Owen W. Crumpacker)
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Hammond, Indiana
Counsel for Appellant.

Nos. 498, 499 and 500. BARTLETT, TRUSTEE, *v.* GROSS INCOME TAX DIVISION ET AL. Appeals from the Supreme Court of Indiana. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Raymond Harkrider* and *Owen W. Crumpacker* for appellant. *J. Emmett McManamon*, Attorney General of Indiana, and *John J. McShane, Lloyd C. Hutchinson* and *Joseph E. Nowak*, Deputy Attorneys General, for the Gross Income Tax Division, appellee. Reported below: 228 Ind. 505, 93 N. E. 2d 174.